

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

74-1596

To Be Argued by
HOWARD J. GOLDSTEIN

UNITED STATES COURT OF APPEALS
For the Second Circuit

B
P/S

STUART D. WECHSLER, on behalf of himself and all others similarly situated,
Plaintiff-Appellant-Appellee

against

SOUTHEASTERN PROPERTIES, INC.

Defendant-Appellee-Appellant,

MONARCH FUNDING CORP., ANTHONY J. DE MATTEO, WILLIAM L. MANNING, JAMES HENRY, RONALD ULLENBERG, DAVID L. BOYD, H.T. BRADDOCK, GEORGE E. MC GEE III and CHALMERS K. SMITH, and HENRY MC CORD, FORRESTER & RICHARDSON, EDITH COOPER, and SCHNEIDER & BARATTA,

Defendants-Appellees.

On Appeal From the United States District Court For the Southern District of New York.

DEFENDANT-APPELLEE'S BRIEF

HOWARD J. GOLDSTEIN

Attorne; for Defendant-Appellee
SCHNEIDER & BARATTA

1250 Broadway
New York, New York 10001



TABLE OF CONTENTS

	Page
Statement of Issues	1
Point. Plaintiff's Counsel Cannot Recover Any Fee From Defendant Schneider & Baratta	1
Conclusion	3

TABLE OF CASES

Grace v. Ludwig, (2d Cir. 1973) 484 F. 2d 1262, Cert. Denied, 40 L. Ed. 2d 110	2
---	---

UNITED STATES COURT OF APPEALS
For the Second Circuit

STUART D. WECHSLER, on behalf of himself
and all others similarly situated,

Plaintiff-Appellant-Appellee

-against-

SOUTHEASTERN PROPERTIES, INC.

Defendant-Appellee-Appellant

MONARCH FUNDING CORP., ANTHONY J.
DE MATTEO, WILLIAM L. MANNING, JAMES
HENRY, RONALD ULLENBERG, DAVID L. BOYD,
H.T. BRADDOCK, GEORGE E. MC GEE III and
CHALMERS K. SMITH, and HENRY MC CORD,
FORRESTER & RICHARDSON, EDITH COOPER
and SCHNEIDER & BARATTA

Defendants-Appellees.

On Appeal From the United States District
Court for the Southern District of New York

DEFENDANT-APPELLEE SCHNEIDER & BARATTA'S BRIEF

STATEMENT OF ISSUES

The only change Defendant would make in that section of Plaintiff's
brief entitled "QUESTION PRESENTED" is that only one Defendant, Southeastern
Properties, Inc., made the offer of recission set forth therein.

POINT

PLAINTIFF'S COUNSEL CANNOT RECOVER ANY FEE FROM DEFENDANT
SCHNEIDER & BARATTA

By order of the District Court (Pages 345(a) to 351(a)) this action was
dismissed without any determination as to its being a class action or as to its
merits. Likewise, the Court declined to grant Plaintiff counsel fees (Page 351(a)).

In declining to grant counsel fees the Court relied heavily on the case Grace v. Ludwig (2d Cir. 1973) 484 F. 2d 1262, Cert. Denied, 40 L. Ed. 2d 110. In that case, as here, a regulatory agency had begun an investigation following which private counsel for Plaintiffs stepped in. In the Grace case, the Court held very clearly that counsel fees for Plaintiff were not warranted because the action by Plaintiff was superfluous and the Securities & Exchange Commission could and did succeed without intervention by Plaintiff.

In this case, an almost identical situation existed. The Attorney General of the State of New York stopped trading in the stock of Defendant Southeastern Properties, Inc. and immediately following the stop order, Plaintiff commenced an action. The question as to how Plaintiff could have commenced an action so quickly without obviously having any facts on hand was raised during a hearing held before Judge Knapp on July 31, 1973 (Pages 328(a) to 330(a)). Plaintiff's motives were clearly questioned during this hearing and rightfully so because of the hastiness in which the action was brought. It should be noted that Plaintiff started with one complaint and then amended it further down the line; in fact, Plaintiff did not even bother listing the original complaint with the documents filed before this Court.

As indicated more clearly in the response of Mr. Labaton, one of the attorneys for Plaintiff, commencing on Page 329(a) and continuing to the top of Page 330(a), Plaintiff's entire case up to that point consisted of the facts alleged in an affidavit presented by an Assistant Attorney General of the State of New York. Therefore, Plaintiff's contention that he forced Defendant Southeastern Properties, Inc. to settle with the Attorney General's Office is totally without basis.

It is important to remember that only one defendant, Southeastern Properties, Inc., made and participated in the settlement with the New York State Attorney General's office (Pages 3 and 6 of Plaintiff's brief). None of the other Defendants, upon information and belief, and definitely not this Defendant, had anything to do with that settlement.

As far as this Defendant is concerned, there has been no finding of liability against it and it did not participate in any settlement resulting in the dismissal of this case. Therefore, there can be no question but that this Defendant cannot in any way be liable for Plaintiff's counsel fees since it goes without saying that some indicia of liability toward Plaintiff would have had to be found against this Defendant, either after a trial or, perhaps by inference, before liability for counsel fees could be imposed. The record is clearly void of any such indications.

CONCLUSION

THE LOWER COURT ORDER SHOULD BE IN ALL RESPECTS UPHELD BUT, IN THE EVENT THAT THIS COURT SHOULD DECIDE THAT PLAINTIFF IS ENTITLED TO ATTORNEYS FEES, THEN DEFENDANT SCHNEIDER & BARATTA SHOULD NOT BE LIABLE THEREFOR.

Respectfully submitted,

HOWARD J. GOLDSTEIN
Attorney for Defendant-Appellee
SCHNEIDER & BARATTA
1250 Broadway
New York, N Y 10001
212 736-8088

2 COPIES RECEIVED

HART & HUME 8/14/74

ATTORNEYS FOR ~~James Henry, Jr.~~
Henry, Melvin, Forester
Sklarson

2 Copies received 8-14-74

Shatskin and Cooper
attorneys for Stuart S Wechsler

2 copies received 8/14/74 at 3:00 pm

Schwartz Bins Leeder & Jacoby

Richard L Popoff

Attorneys for Southeastern Properties Inc.

2 copies received 8/14/74

Kane, Deasy, Prins, Bal & Brozansky, P.C.
Attn: for Frank J. Tandy Corp.